

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF NORTH DAKOTA  
WESTERN DIVISION

<p>VANESSA DUNDON, ET AL.,</p> <p>on behalf of themselves and all similarly-situated persons,</p> <p>Plaintiffs,</p> <p>v.</p> <p>KYLE KIRCHMEIER, ET AL.,</p> <p>Defendants.</p>	<p>No. 1:16-cv-406</p> <p><b>PLAINTIFFS' REPLY IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION</b></p>
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**I. INTRODUCTION**

Defendants attempt to paint a picture of hundreds of crazed protesters overrunning police lines and attacking officers, while at the same time, acknowledging that the majority of the water protectors are nonviolent. Devoid from defendants' narrative is any explanation for the use of force on any of the plaintiffs. Defendants have not proffered one single use of force report concerning any of the plaintiffs, or any other individuals who were injured on November 20, 2016. Nor have they presented any specific evidence showing that any of the named plaintiffs and declarants who were injured had engaged in violent conduct.

Since plaintiffs' motion was filed, defendants' unlawful use of force has continued, causing additional severe injuries to peaceful protestors. It is apparent that officers are being given dangerous weapons without proper training or guidelines for their use, and without crowd control training that would enable them to lawfully *and* effectively handle the small number of individuals who engage in crimes during pipeline protests -- not by inflicting unconstitutional mass punishment on crowds of peaceful demonstrators, but by arresting those who break the law.

The government entity defendants are responsible for this poor decisionmaking and supervision, and are racking up liability for serious permanent injuries week by week. It would benefit them, as well as the plaintiffs, and the public at large, for the Court to put a stop to the bloodshed.

Plaintiffs share defendants' concern for the officers' safety and do not seek to prevent officers from legitimately defending themselves or from doing their job. Rather, plaintiffs ask the Court to impose reasonable constraints on defendants' use of force by prohibiting the indiscriminate use of direct impact munitions and explosive grenades for crowd dispersal, and the use of water hoses or cannons in freezing weather, in accordance with contemporary law enforcement standards nationwide.

## II. ADDITIONAL EVIDENCE

Plaintiffs are filing herewith a number of additional declarations as well as video evidence which largely refutes the assertions of the defense witnesses. All of plaintiffs' witnesses are willing to testify publicly under oath at an evidentiary hearing.

**1. Commissioner Thomas C. Frazier** is the former commissioner (chief) of the Baltimore Police Department, previously a deputy chief in San Jose, California, and the former head of the federal Department of Justice Office of Community Oriented Policing and of the Major Cities Police Chiefs Association. He conducted the independent investigations into the law enforcement response to large demonstrations and riots in Ferguson, Missouri, and Oakland, California and has been involved in overseeing consent decrees over three major city police departments. As such, he is well acquainted with large crowd events and professional standards for policing them. Commissioner Frazier reviewed the defense affidavits and several videos of the event.

In my professional opinion the Defendants' representation that what happened on November 20, 2016 near Standing Rock was a riot is overstated and inaccurate. It was, by and large, a crowd control event. By that I mean there were a handful of protestors whose intentions were to challenge law enforcement authority and cross police lines. They threw objects and attempted to breach the concertina wire and move the vehicle on the bridge. The one person able to cross the concertina wire was immediately arrested. The bulk of the protestors were there to protect tribal lands and sacred religious sites. Though present, these persons did not challenge law enforcement, were prayerful, and not assaultive in any way and there was, therefore, no justification to use force on them. Even assuming that there were persons on the front line who were throwing objects or otherwise posing a physical threat to the police, the reach of law enforcement's shoulder fired weapons and the water cannon were from 25 to 100 yards, an expansive area which encompassed and reached protestors who had no intention of challenging the line of law enforcement. The reach of these weapons ensured that individuals outside any zone or area that even could be considered to be directly confronting law enforcement could be and was subject to serious bodily injury. This is contrary to modern law enforcement standards for use of force.

(T. Frazier Declaration, p. 3.)

Commissioner Frazier's review indicated that law enforcement was at no time outnumbered or endangered. "If any protestor was able to breach the concertina wire, there were adequate law enforcement officers on the skirmish line to effect an immediate arrest" (as did occur when a lone protestor tried to climb over the barbed wire.) "Perhaps the true nature of the protest is best demonstrated by the fact that, despite the Defendants' claim that the protest was out of control, only one arrest was made and there was only one minor injury to an officer", who was "dazed" but apparently needed no medical attention. (*Id.* at p. 4.)

Commissioner Frazier expressed particular concern regarding the use of direct fired impact munitions, launched munitions, and water hoses on the crowd.

Law enforcement's unnecessary use of these weapons and the resulting serious injuries from their use are important reasons which justify the Plaintiffs' request that this Court prohibit the reckless use of these weapons. If the victims of these weapons had violated the law, there were enough law enforcement officers present to arrest them. Therefore, there exists no reasonable justification for their use.

Additionally, the use by law enforcement of shotgun fired bean bag rounds, as seen in video supplied to me by the plaintiffs, is excessive. These are highly dangerous weapons which should never be used indiscriminately in a crowd, yet that is exactly what I saw based on the video evidence. It is inappropriate and excessive force to shoot beanbag rounds, or to launch direct impact sponge rounds, into a crowd for the purpose of crowd dispersal. Launched munitions, including explosive grenades, gas, and smoke canisters, with their high trajectory, as evidenced by the video, landed far behind protestor lines, injuring persons on the periphery of the protest who were clearly not advancing on the police. This too was an unnecessary use of force, and was also likely responsible for many of the fires reported by law enforcement. Also, when an emergency call for assistance is broadcast, the level of training of responding officers is unknown and thus use of specialty impact munitions, explosive grenades and other weapons that require specialized training is contra-indicated.

I have never seen, in any other American city or county, the use of water hoses or a water cannon against a United States citizen for any reason although I have read about this occurring in the early 1960s against civil rights marchers. The brute force of the impact of the water jet is a force option that would not be considered appropriate by most modern police chiefs or sheriffs, or tolerated by their citizenry. In this case, the use of this device in sub-freezing temperatures, in my opinion, serves no reasonable purpose and can only be considered a retaliatory and punitive action. Not only can the water jet cause injury when applied at such

short range, but the water was also subsequently sprayed in a wide arc and far behind protestor lines, seemingly to get as many protestors wet as possible. The video evidence shows indiscriminate use of the water on peaceful protesters who were not being aggressive towards the police. In the sub-freezing weather, its use was certain to cause hypothermia, which it did. It was reported that approximately two dozen people were hospitalized for hypothermia on the night in question. This was an obvious and predictable outcome of the use of the water jet. Further, it was clearly intentional, and unnecessary on the part of the law enforcement decision makers. (T. Frazier Declaration, pp. 4-5.)

Frazier went on to point out that although he would not condone the use of water or indiscriminate use of impact munitions on crowds, “if the intention was crowd dispersal, such use should have ceased as soon as it became apparent that it was not having the desired effect. Law enforcement should distinguish between persons who attack the police or actively resist arrest, and protesters who disobey dispersal orders as an act of symbolic civil disobedience. There is no legitimate reason to continue using force on demonstrators who are simply nonviolently disobeying a dispersal order once it is clear that they are determined to hold their ground until arrested. The only proper police response is to make arrests – not to deliberately inflict physical punishment.” (*Id.* at pp. 5-6.)

Defendants’ use of excessive force has continued. **Marcus Mitchell**, age 21, sustained serious eye and other injuries in the early morning of January 19, 2017, when defendants again used dangerous impact munitions to disperse water protectors from the Backwater Bridge. Mr. Mitchell was standing passively in front of women and elders to shield them with his body, with his hands up, telling the officers that he was peaceful and unarmed, when officers shot him numerous times with lead-filled “beanbags”-- including once in the back of the head as he tried to flee. The lead pellets became embedded in his eye and face necessitating surgery and he suffered a possible optic nerve evulsion, extensive cranial nerve damage, and multiple orbital fractures. Like plaintiff Vanessa Dundon, Mr. Mitchell may never regain sight in that eye. (Mitchell Decl.)

The declaration of **Martyn Lenoble** provides a detailed account of the November 20 incident, with photographs. Mr. Lenoble, a musician who lives in Los Angeles, was preparing to leave Oceti Sakowin Camp on November 20, 2016, when he noticed a semi-truck try to tow the burned out truck away from the police barricade. There were not more than ten people involved. The police remained behind the burned trucks, the concrete barriers, the razor wire, and the

armored vehicles. Additional officers quickly arrived and immediately began shooting impact munitions and teargas canisters. The second teargas canister started a fire in the brush. As can be seen in Mr. Lenoble's photos, there were only a small number of protesters present at that point. The semi pulled the burned out truck away from the barricade at about 5:30pm. Larger numbers of water protectors arrived after that. Mr. Lenoble's pictures show the police shooting water at a peaceful crowd including a man holding up a ceremonial peace pipe, persons making peace signs with their fingers, and people who were clearly taking photographs or video. When teargas was launched all the way to the south end of the bridge, it impeded protesters from leaving as south was the only way to go. Meanwhile, the police continued to shoot impact munitions into the crowd.

Mr. Lenoble never saw anyone threaten or attack the police, although the water protectors did not leave the bridge. "The police appeared to be completely safe, and separated from the water protectors by the concrete and razor wire barricade, military style police vehicles, other police vehicles, and the one broken down truck that was remaining." His photographs show that the officers were wearing helmets and visors and holding shields. Mr. Lenoble described how the shooting and water spraying went on for hours as water protectors remained on the bridge, singing and drumming, and medics and ambulances removed the wounded.

After Mr. Lenoble took a photograph of a particular officer, he saw him walk over to another officer who was holding a "less lethal" gun and nod in Mr. Lenoble's direction. The other officer took direct aim at Mr. Lenoble, although Mr. Lenoble was able to avoid the projectile. (Lenoble Decl. and see photographs therein.)

Plaintiffs are also submitting additional Legal Observer declarations with this Reply. **Phillip Weeks** was a Legal Observer in the vicinity of the bridge for six hours on the night of November 20. He, too, observed that law enforcement was separated from the protesters by a burned vehicle and coils of concertina wire that completely blocked anyone from getting north of the barricade. Like others, at the beginning of the evening, Mr. Weeks heard one announcement from law enforcement, warning the protesters to move south. After that, teargas canisters and munitions were fired. "Most of those gathered were standing on the highway away from the razor wire and thus a significant distance from law enforcement who were all on the north side of the wire. From what I could see they were only engaged in peaceful protest, song, or prayer."

At 6:36 pm, I recorded the sound of law enforcement using the water cannons to

soak the protesters. The force of the water cannons was enough to knock some of the protesters off their feet. The water cannon they were using was on the top of a SWAT like vehicle where the LRAD equipment was located. The top of the vehicle was approximately 15-20 feet off the ground and the water cannon could reach people on the road, arching water high in the air or by a direct line of fire. Water protectors were sprayed whether they were on the highway or off to the side of the highway. In addition to the water cannon, the tear gas, and the smoke canisters, there was ammunition fired over the protesters that created loud booms. At this time there were additional calls for medics for injured water protectors.

(Weeks Declaration, p. 2.) Mr. Weeks did not hear another law enforcement announcement after the warning he recorded at approximately 6:23pm - before the arrival of many of the water protectors. (And see Lenoble Declaration, p. 5.)

The entire time that I was legal observing the use of the water cannons never appeared directed to put out the two controlled camp fires the protesters had made to keep warm, but rather, to assault water protectors... I never observed any of the protesters do anything that could reasonably be interpreted as aggressive toward law enforcement. The only things that I saw thrown from the side of the water protectors to the side of the razor wire where law enforcement was located was an occasional plastic bottle of water, maybe 4 in total throughout the entire evening (7 hours). I also witnessed an individual protester try to throw a spent smoke canister from where it landed on the west side side of Highway 1806 to the north side of the razor wire where the police were located. All of the other protesters I observed gathered in protest to DAPL were only engaged in peaceful protest, song, or prayer. None of the protesters I witnessed were engaged in attempts to cross the razor wire or carry out any type of assault against the law enforcement. I witnessed the majority of protesters in prayer, standing quietly in opposition to the construction of the Dakota Access Pipeline, or chanting slogans.

(Weeks Declaration, p. 3-4.)

The water cannons were used throughout the night, either taking direct aim at protesters or arched high in the air. Thus many of the protesters who were far back from the "front line" were sprayed with water. At one point in the night, water protectors held up a tarp for the sole purpose of keeping the prayer assembly from being doused by the water from the cannons as they sung their prayers.

The use of the water cannons, pepper spray, and munitions by law enforcement appeared largely indiscriminate.

(*Id.* at p. 4.)

**Cecilia Candia**, an attorney, also acted as a Legal Observer, observing the incident from what she thought was a safe distance, south of the bridge, but was still impacted by the teargas.

Ms. Candia observed almost continuous use of the water cannon or hose and chemical agent canisters by law enforcement for over three hours. She saw a gas canister launched next to the area where medics were trying to treat the injured, south of the bridge, in an area not closed by the police. “Since there was only one way away from the area – South of the bridge and South on the highway – there often was no safe way away from law enforcement. Because officers were throwing gas canisters far into the middle of the crowd on the bridge, and also to the South of the bridge, people, including myself, were locked in by the gas, and also blinded and gagging from the gas. There was no safe way away and out.” (Candia Declaration, p. 4.) Ms. Candia saw numerous people injured and never heard any dispersal announcements by law enforcement. (*Ibid.*)

**Gabriela Lopez**, a 31 year old attorney, also acted as a Legal Observer. She observed police indiscriminately shoot water cannons at peaceful protestors from behind the barricade. She saw flash bang grenades and tear gas canisters land as far as the south end of the bridge close to where medics were assisting injured people. She saw several gas canisters shot at vehicles, including a medical vehicle, coming in and out of the area at a distance of 40-60 feet south of the police barricade. Ms. Lopez observed the police throw at least four flash bang grenades at protestors peaceably assembling on the banks of the river. Clouds of tear gas affected people whether they were near the barricades or not. Her own eyes watered, she gagged and had difficulty breathing due to her asthma as a result of the tear gas. She observed injured people, including a person who had to be carried by others and a man who suffered a seizure, as well as repeated calls for medical attention. During the three to four hours she was on the scene, she never heard any warnings or directions from the police. She did not see any threatening behavior or objects thrown by the protestors with the exception of a few individuals, who picked up canisters and sent them back over the police barricade.

In addition to the medics whose declarations were filed with the motion, **Dr. Kalamaoka’aina Niheu, M.D.**, treated the injured on site on November 20, 2016. Approximately 300 injuries were identified, triaged, assessed, and treated by the physicians, nurses, and other medical personnel of the Standing Rock Medic and Healer Council, working in collaboration with local emergency response, as the result of the force used by the police over the course of ten hours. At least 26 seriously injured people had to be evacuated by ambulance to three area hospitals. Every emergency medical unit from the Standing Rock Sioux reservation



responded to the incident and additional ambulances were sent from Cheyenne River Sioux Tribe (South Dakota), Kidder County, and Morton County.

The injuries included an elder who lost consciousness and was revived on scene; a young man with a grand mal seizure; a woman shot in the face by a rubber bullet which caused an eye injury and possible detached retina (plaintiff Vanessa Dundon); a young man with internal bleeding who was vomiting blood after a projectile injury to his abdomen; a man shot in the back near his spine by a munition causing blunt force trauma and a severe head laceration (plaintiff Israel Hoagland); and multiple fractures secondary to projectiles fired by police. Dr. Niheu noted that the law enforcement actions would have led to numerous fatalities were it not for the work of the Standing Rock Tribe EMS services, the Medic & Healer Council, and other medical personnel and community members. (Niheu Decl.)

**Jeremiah Murphy**, an EMT, observed a man who had been shot in the head holding a roll of gauze against his head that was completely soaked in blood. The man yelled in agony. Mr. Murphy also observed a man who got shot in his kneecaps and private parts, and a woman who was shot in her private parts. Mr. Murphy will never forget the woman's screams. As Mr. Murphy administered eyewash to a water protector, he himself was shot with a gas canister two inches left of the medic cross that was taped over his heart. He sustained a chemical burn on his face and neck. Officers subsequently threw an explosive grenade nearby. (Murphy Decl.)

**Lianna Elizabeth Constantino-Cardon**, a paramedic and former police officer, was another medical volunteer who dealt with the approximately 300 people who were treated for injuries from this incident. She saw two women who had been hit directly in the groin with either bean bags or rubber bullets causing ongoing pain and trauma. She saw another woman, who had gone to the bridge to pray, and had been hit in the pelvis with bean bags or rubber bullets who thought she might be pregnant and very upset this could injure her baby. Many people were upset, crying, afraid, and traumatized. (Constantino-Carden Decl.)

Another person working in the medic tent that night was **Marma Rogers**, 68, a nurse. Over the course of the night, Ms. Rogers treated water protectors who had been seriously injured after being shot with munitions in the head, abdomen and arms. She saw a man who had been hit in the hand with a rubber bullet, breaking two fingers (plaintiff David Demo); his hand was bleeding profusely and his bone was visibly coming out of the skin. He and others were sent to the hospital. Ms. Rogers treated a woman who had been shot in the breast, people who could not



walk due to hypothermia from being sprayed with water hoses in the freezing temperatures and people who had been sprayed with chemical agents and were experiencing burning pain and respiratory problems; at least twenty people were so severely affected that they required breathing treatments for days afterward.

**Zachary Johnson**, a 35-year-old EMT, heard that people were being shot near the bridge and immediately went there to see if he could help. He remained in the vicinity for about 9 hours. Mr. Johnson saw law enforcement spraying the protesters with the water cannon for at least eight hours, including people who were not near the barricade, and were not doing anything threatening or aggressive. It also appeared that people with cameras were specifically targeted with the water. Throughout the night, he saw that some of the canisters fired by police were starting small grass fires, and he and others did their best to put them out by dousing them with water and stomping on the fires, despite the teargas. He watched as officers fired at people who had their hands up while at close range; he saw an officer shoot a water protector who had just shouted that this was a peaceful action. The man had to be carried away by medics. He saw officers firing directly into crowds of people who were just standing there, doing nothing. He saw officers shoot someone in the back who was carrying an injured person. He saw an officer spray mace directly in the face of a water protector who was sitting on the ground praying; the officer laughed as he walked away. Mr. Johnson did see protesters throw two water bottles. Each time this happened, other water protectors yelled at the person who threw the water bottle not to throw things because they were engaged in prayerful action.

Ms. Johnson was hit in the leg by an explosive grenade and fell to the ground. He was more than 50 feet from the barricade. His leg was bruised and in pain for weeks afterward. He still struggles with the trauma of this night, which felt like a one-sided war zone. (Johnson Decl.)

Additional accounts of the night of November 20, 2016, have been provided by the following people:

**Alberto Flores**, a 41 year old clinical social worker, went to Oceti Sakowin camp to provide mental health support. On November 20, he observed what was occurring in the vicinity of the bridge for four or five hours, standing with the medics about 200 yards south of the barricade, and south of the bridge itself. He saw a small group of water protectors close to the police barricade, and a larger group further back, on the southern portion of the bridge and south of the bridge. Many water protectors were praying and drumming in a peaceful way, presenting

no threat to the police, while being drenched in icy water by the police from a mounted water cannon. Throughout the four to five hours he was present, Mr. Flores saw officers spray water as far as it could reach on all sides of the bridge, apparently trying to soak as many people as possible. Mr. Flores never heard any police announcements, orders, or warnings. With the exception of one person whom Mr. Flores saw throw a small object from 50-100 yards from the barricade, he did not see water protectors throwing things at the police, or in any way threatening them. The police remained behind their tall spirals of razor wire, concrete barricades, the burned out truck and with armored vehicles lined up alongside the barricade.

Mr. Flores saw teargas canisters land on the south side of the bridge, as far as the area where medics were treating people, as well as in the middle of the crowd and in the grassy area on the banks of the creek. Some of the canisters started fires in the grass, which the protesters tried to put out. Gas enveloped the medical area and impaired the medics' ability to treat people who were suffering from hypothermia and injuries. He witnessed at least twenty to thirty water protectors being treated for shock, hypothermia, and tear gas, and at least three people with large welts on their backs and faces, who reported that their injuries were the result of law enforcement projectiles. Mr. Flores saw soaked water protectors start two small controlled fires and warm themselves there, on the south side of the bridge, about 100 to 150 yards from the police barricade, and another on the mud bank of the creek. He never saw or heard of anyone attempting to throw logs or burning logs at police. (Flores Decl.)

**David Karayof**, 26, was in the area of the bridge from 5 p.m. until 12:30 a.m. the next day. He went to peacefully protest and was not armed and did not see any other protestor armed with any weapon. At 6:15 p.m. he saw a man whose hands were up struck in the chest with a tear gas canister, causing him to fall backwards. Law enforcement then shot additional tear gas canisters as Mr. Karayof and others were bottlenecked on the bridge. Later, law enforcement shot explosive devices and tear gas canisters toward both corners of the northern barricade and as people ran, additional canisters were shot into the crowd 100 feet away. The tear gas caused Mr. Karayof's eyes and throat to burn, he had difficulty breathing, gasped for air and vomited. He saw others vomiting, screaming and crying. He saw 20 people hit with munitions. He observed protestors continually sprayed with water with their eyes closed and hands fixed in a praying position. He was doused with water, causing his clothes and hair to freeze, as he carried blankets and ponchos to others. (Karayof Decl.)

**Daniel Kanahele**, 64, went to the bridge area around 8 p.m. and observed the water cannons going full blast when he arrived. He observed police shoot massive amount of tear gas using launchers. He saw canisters go over his head, to the right and left, toward both side of the bridge and all the way over to the south side, causing a huge cloud of smoke over everyone on the bridge. His eyes burned, he started choking and hundreds of people were gagging, some on the ground immobilized and some vomiting. He saw police shoot devices that landed in grassy areas, causing fires. He saw people shot with rubber bullets; falling, with bloodied heads and being carried away. Mr. Kanahele was shot in the leg with a rubber bullet or bean bag while he was standing in the middle of a crowd. Throughout the five to six hours he was there he saw one individual throw a stick and another one individual throw a rock in the direction of police. Both individuals were immediately chastised by other protestors.

**Deborah Gaudet**, 47, arrived at the bridge area about 9 p.m. She observed law enforcement spraying water continually for two minutes at a time and repeatedly at two men who were standing peacefully facing them. She did not see any protestors with any weapons and only heard protestors praying, singing and chanting. She saw law enforcement utilize tear gas and observed law enforcement's escalation of force over the three hours she was present. The tear gas made it difficult for individuals to leave because it was dark and the gas was sprayed into the crowd. The use of the water cannons and rubber bullets caused a lot of difficulties and fear. It was difficult and dangerous for us to disperse.

**Ron His Horse Is Thunder** observed the police activity at Backwater Bridge for approximately forty minutes beginning at 9:15pm. He observed officers spraying people on the bridge and in the field, spraying the water back and forth, pausing on various water protectors and then back again. Mr. His Horse Is Thunder stood standing still, in one spot, for the entire forty minutes he was there and was hosed multiple times. About two seconds before he was shot, he heard police yell, "Step back", but there was no time to move before they began firing rubber projectiles from a launcher. A projectile struck him on his right side. "What I saw that night has really affected me. I never thought I would see such violence at a peaceful protest. It was very disturbing to see the police so violently attack unarmed, peaceful, protestors." (His Horse Is Thunder Declaration, p. 2.)

**Thomas Joseph**, age 37, was at camp on November 20 when he heard that help was needed because people were being shot at the bridge north of camp. He arrived in that vicinity

around 7:00 p.m. and stayed until 10:00 p.m. During that time he never heard the police tell the group to disperse. Mr. Joseph was peppersprayed or teargassed multiple times, so much that it made him vomit. Mr. Joseph observed police shoot tear gas canisters towards the locations on the south side of the bridge where medics were tending to injured people, which really shocked him. He also observed a person get shot in the head with a munition.

Mr. Joseph got drenched with the water cannon and observed the water constantly spray from the left to the right for about four hours. The police would spray the water down right at people in the front and then arch it up to hit people in the back. Sometimes the officer would drench a single person for ten seconds or more, and then come back and drench that same person again. The police also lobbed what he thought were ten to twelve flashbangs into the crowd where they exploded, as well as directly at the front line. "It was especially disturbing to see the officers shoot women and elders. We were in prayer. They were mocking us. The officers were shooting and using the water cannon on people who were unarmed and standing together peacefully." (Joseph Declaration, p. 2.)

**Adam DuBord**, 25, went to the bridge area around dusk on November 20. When he arrived he observed law enforcement spray a group of 15-20 elders, some kneeling, some standing and singing and praying, with a chemical agent, using a canister with a nozzle to direct the spray. One protestor was sprayed continuously for two to five minutes, but did not move or react. He also observed a truck with a water hose that law enforcement used to spray protestors. The width of the water spray was the size of a grapefruit and he saw a fire truck arrive to replenish the water. He saw peaceful protestors struck with rubber bullets or bean bag munitions approximately 20 times. Mr. DuBord did not see any aggressive or threatening behavior of the protestors. He himself was maced on three occasions, once when he was on the bridge and two times when he was on the east side of the bridge, causing stinging and pain in his eyes. He was sprayed with water and his jacket became stiff and frozen. He was also hit with a rubber bullet or bean bag to the left side of his genitals, causing him to continue to suffer pain in that area. (DuBord Decl.)

**Jin Chang**, 22, went to the bridge in response to cries for help and saw some type of explosive projectile thrown at a group of about 80 people peacefully huddled and standing on the bridge. He observed three to five officers spraying water on a fire, and then without warning the officers turned and sprayed him for 10-15 seconds until he was drenched. Officers shot

projectiles which emitted heavy tear gas into the air, causing him to immediately cough and his mouth to burn. He saw officers shooting protestors with beanbags and other munitions, appearing to target people's heads and groin areas, even from considerable distances. When Mr. Chang said "honor your treaty" to an officer, the officer shot him three to four times from a distance of 25 feet. He suffered painful bruises that did not fade for ten days. Mr. Chang never heard any orders or warnings to disperse from any law enforcement officer. (Chang Decl.)

**Alfredo Labro**, 29, a firefighter, saw a law enforcement officer throw what looked like a grenade onto dry grass, starting a fire. As protestors tried to put out the fire, officers raised their guns at them and the protestors backed away. Mr. Labro saw two additional fires caused the same way. He saw protestors trying to move a burned out truck but did not see any protestor act aggressively or throw any bomb or propane. He observed officers shooting people, including women, with rubber bullets and bean bags, some in the face. He observed people being pelted with munitions as they tried to drag injured people to safety. An officer shot him in the eye, causing him to fall to the ground, and at the same time he was subjected to tear gas. The tear gas burned his skin and made him vomit. He has been told his vision has been affected by being shot. (Chang Decl.)

**Grecia Rojas**, 27, went to the bridge with others about 7:00 p.m., and remained there until approximately 11:30 p.m. People were peacefully praying in front of the barricade. Water was being jetted from a tank. The entire time she was there she never heard any police or security forces give an order to disperse. Ms. Rojas prayed and sang for about 20 minutes until the police shot teargas canisters in multiple directions and she and the others ran, choking and unable to see or breathe. She heard screams, and could not find her way out of the teargas. She saw several people get shot, including a man in front of her who was shot in the back and fell. She saw a man shot in the head with a rubber munition. Blood was running down his head. Ms. Rojas was gassed about four times before crawling under the bridge to escape. This was extremely painful. From the top of the hill, she saw that the police were launching the canisters directly into the crowd, hitting people's bodies, and could hear screams and shots. (Rojas Decl.)

**Jayram Toraty**, 24, was in the vicinity of the bridge for about six hours. He and his friends went up to the top of the hill and saw the water cannon already in use. He heard some type of an announcement at various points but this was in the midst of the police using water and other force and he could not really make it out. It looked like the officers were spraying as many

people as they could with a fire hose, while at the same time, shooting tear gas. Many projectiles were shot and Mr. Toraty was hit multiple times, as were others who were simply standing or walking around. He also saw the grenades or canisters ignite fires in the grass on the east side of the bridge, which protesters stomped out. The water protectors made some contained fires on the ground near the bridge to get warm and dry, where cold and injured people were taken. Mr. Toraty was shot in the elbow and in the foot when he was near the front of the crowd. One of the projectiles exploded or ricocheted and ripped his pants. (Toraty Decl.)

**Mercedes Terrence**, 20, observed a man on the ground who appeared to be seriously injured on November 20. He was extremely red in the face and fluids were coming out of his mouth. Ms. Terrence tried to help him by yelling “medic.” While she and a friend were trying to help the injured man, officers shot munitions directly at them and the injured man. Her friend jumped in front of her and took a canister to the hip, and was seriously injured. Ms. Terrence was helping him back to the camp, and others were also moving toward the camp, when law enforcement shot tear gas canisters to both ends and in center of the bridge, surrounding the crowd in a cloud of teargas such that they could not disperse south without going through the teargas. After getting her friend back to camp Ms. Terrence went back to try to help other injured people, but she was hosed with water which seemed to follow her no matter which direction she went. (Terrence Decl.)

**Nicholas Kalergis**, 35, saw many people praying, singing and drumming, and did not see anyone acting threatening or aggressive toward law enforcement. He saw people hit with munitions and helped carry people who had been shot to the medic tent. He saw people who had been hit in the knees, head, and ribs. He saw law enforcement spraying the water at people on the barricade with full force, but also arching the water stream over their heads to hit people who were nowhere near the front line. He helped carry several people to the medic tent who were freezing cold and uncontrollably shaking after being sprayed by the water. He saw water protectors starting small campfires to warm themselves after being exposed to the water in the freezing temperatures, as well as fires that seemed to be caused by the chemical munitions deployed by law enforcement. He saw tear gas canisters shot all the way to the end of the bridge, creating clouds of gas that he and other protectors were caught in, even though they were far from the barricades. (Kalergis Decl.)

Plaintiffs are also submitting additional declarations refuting defendants' account of the October 27, 2016, event. **Katriona Auerbach**, 44, attended the prayer demonstration that day when law enforcement closed in on her and others and told them to move or be arrested. As the officers made these statements, she saw officers grab a man and strike him with their batons. Law enforcement deployed explosive grenades and tore down teepee poles and grabbed young men. She saw a single small water bottle thrown in the direction of officers and immediately heard other protestors say "don't throw anything" and "stay peaceful." Law enforcement approached a woman and told her to stop praying, and grabbed a young man for arrest at the edge of the group. (Auerbach Decl.) **Alexander Kubala**, 35, also attended the prayer demonstration on October 27. He saw the law enforcement officers, wearing riot masks and body armor, brandishing batons, shotguns, what appeared to be grenade launchers, and pepper spray canisters. He saw officers fire canisters at people; hit people with batons; grab, strike, push, and step on people. Mr. Kubala was struck in the ribs with a baton, hog tied hands and feet with zip ties, and his hands and face were bloodied. (Kubala Decl.) **Carol Ann Bastian Masden**, age 69, was arrested while participating in a prayer circle at the "north camp" where she and others were praying on their hands and knees. (Masden Decl.) **Nicholas Wagner**, 37, was shot in the face with a munition on October 27, 2016. Mr. Wagner was unarmed and was not aggressive – he had simply asked the officers for their badge numbers and an explanation of what they were doing when he was shot. He sustained a concussion and acute pain in his head. During the same raid, he saw many others being sprayed with chemical agents and clubbed by law enforcement, and heard law enforcement using the LRAD system to announce "don't shoot us with your bows and arrows." He never saw anyone with bows and arrows. (Wagner Decl.)

On November 20, Mr. Wagner went to the bridge area to pray and to offer help to injured people. Within hours his clothes were covered in icicles. He saw people standing near the barricades holding wooden shields, but who were only peacefully standing their ground. He witnessed a friend be shot in the groin with a munition fired from a shotgun-like weapon, and had to call for medics to help because his friend was in such pain that he could not walk. Nicholas was shot in the leg and buttock with a munition that looked like a paintball. At no point was he acting aggressively or violently. Throughout the night, he witnessed many water protectors being shot at and sprayed with water while praying, begging law enforcement to stop, holding their hands in the air, and even telling the police that they loved them. It was



traumatizing to experience the violent response from law enforcement on nonviolent people. (Wagner Decl.)

Plaintiffs dispute defendants' claims that water protectors were wielding weapons. **Janie Stein**, 58, and **Martin Bates**, 62, South Dakota residents, camped at the Oceti Sakowia site for 40 days prior to November 20, 2016. Mr. Bates, a veteran who has done a lot of camping, helped with camp maintenance to keep other residents warm, sheltered and fed. He and Ms. Stein and other residents used axes, hatchets and chainsaws to cut wood. They used various types of knives to cut food, rope, and kindling. Neither of them ever saw any residents using these tools in a weapon-like or threatening way. They saw residents at camp using kerosene and other chemicals to start cooking fires, but never saw anyone using these things as explosives, possess any type of firearm or sling shot. Ms. Stein saw a bow and arrows on one occasion provided as gifts in a special ceremony. (Stein Decl., Bates Decl.)

Plaintiffs' attorney **Rachel Lederman's** declaration concerns crowd control policies in Oakland and San Francisco, California, cities which regularly face many large protests and crowd events, including tens of thousands of people in the streets, civil disobedience and "lockdowns" of businesses and transit. In the last three decades, the San Francisco police have never used "less lethal" munitions or chemical agents on demonstrators or other crowds, not even when celebrations of the Giants' 2014 World Series victory turned into a huge destructive riot. Water hoses have not been used on crowds in San Francisco since 1960. The Oakland Police prohibit the use of SIM for crowd dispersal and severely restricts their use on individuals in a crowd context to situations which would warrant lethal force and where the officer has a clear shot. Water, aerosol pepper spray, and stinger grenades (one of the types of grenades used in the instant case) are prohibited under any circumstances in Oakland. (Lederman Decl.)

### **III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS THAT DEFENDANTS' ACTIONS VIOLATED PLAINTIFFS' FIRST AND FOURTH AMENDMENT RIGHTS.**

#### **A. THE FAIR CHANCE STANDARD APPLIES HERE.**

Where a plaintiff seeks a preliminary injunction to stop activity that is something other than government action based on presumptively reasoned democratic processes, the plaintiff need only show a "fair chance of prevailing" to show likelihood of success on the merits.

(*Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008); *Heartland Acad. Cmty. Church v. Waddle*, 335 F.3d 684, 690 (8th Cir. 2003).) Because the

defendants' decisions to use water cannons and hoses, chemical agents and munitions are purely discretionary and not subject to the same democratic processes as a statute or administrative code, Plaintiffs' likelihood of success should be assessed using the "fair chance" standard. (*See Rounds*, 530 F.3d, at 732 [illustrating the bifurcated preliminary injunction standard and stating that "[o]nly . . . where a preliminary injunction is sought to enjoin the implementation of a duly enacted state statute, must district courts make a threshold finding that a party is [more than fifty percent] likely to prevail on the merits"].) Plaintiffs' claims satisfy this standard.

**B. PLAINTIFFS HAVE SHOWN A LIKELIHOOD OF SUCCEEDING ON THEIR FIRST AMENDMENT CLAIM.**

"State action designed to retaliate against and chill political expression strikes at the very heart of the First Amendment." (*Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir.1986).) To prevail on a First Amendment retaliation claim, the plaintiffs must show that they engaged in protected activity, that the defendants' actions caused an injury to the plaintiffs that would chill a person of ordinary firmness from continuing to engage in the activity, and that a causal connection exists between the retaliatory animus and the injury. (*Baribeau v. City of Minneapolis*, 596 F.3d 465, 481 (8th Cir. 2010) (per curiam); *see also Hartman v. Moore*, 547 U.S. 250, 256 (2006).)

Plaintiffs were at all times south of the law enforcement barricade. Although defendants are now claiming that the bridge was closed to the public, the barricade is located north of the bridge and there was no sign indicating that the bridge itself was closed as of November 20, 2016, as far as plaintiffs have been able to ascertain. Plaintiffs were on the public road and the curtilage of the public road. N.D.C.C. § 24-03-05, cited by defendants, makes it unlawful to remove, pass through, over or around a barricade. If the barricade was lawful, plaintiffs agree that anyone who removed or went over the barricade could have been arrested (and the one person who did go over the barricade was arrested although for some reason defendants made no attempt to arrest the small group who used the semi to tow one of the burned out trucks away.) Defendants also contend that plaintiffs were engaged in criminal trespass, but under North Dakota law, criminal trespass in violation of N.D.C.C. §12.1-22-03 requires actual notice. Defendants have proffered a press release concerning the bridge closure, which obviously does not give actual notice to all of the plaintiffs and class members. It does not appear that the bridge was posted and numerous declarants have stated that they either heard no dispersal orders, or,

heard an order to go south, away from the *barricade*-- but not an order that the bridge and the area surrounding the bridge were closed. In fact, defendants shot munitions south of the bridge, where the medics were working. (Candia, Flores, Lopez, Demo Declarations.)

Plaintiffs' protest and prayer activity was indisputably First Amendment activity regardless of whether other individuals may have engaged in unlawful acts. Defendants cannot show adequate notice to the entire group that it was unlawful to simply stand on or in the vicinity of the bridge, south of the barricade. Accordingly defendants did not have the individualized probable cause required to effect a seizure. (See *Barham v. Ramsey*, 434 F.3d 565, 573 (D.C. Cir. 2006); *Mitchell v. City of N.Y.*, 841 F.3d 72, 78-79 (2d Cir. 2016); *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).) Plaintiffs have presented a total of 50 declarations with the original motion and this reply, and video evidence, showing that the force was applied in a retaliatory manner, against water protectors who were far from the police barricade and simply praying or singing; as well as against persons who were trying to aid others and persons who were photographing or videotaping. Plaintiffs have more than shown a fair chance of success on the merits of their First Amendment claim.

### **C. PLAINTIFFS HAVE SHOWN A LIKELIHOOD OF SUCCEEDING ON THEIR FOURTH AMENDMENT CLAIM**

#### **1. A Fourth Amendment Standard Applies**

The law is clear that defendants' use of force here is properly analyzed under the Fourth Amendment, not the Fourteenth Amendment due process clause. "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer by means of physical force or show of authority terminates or restrains his freedom of movement through means intentionally applied." (*Brendlin v. California*, 551 U.S. 249, 254, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007) (internal quotation marks and citations omitted).) Whether the force is used for the purpose of effectuating an arrest, or for the purpose of self-defense, it is an acquisition of physical control by a law enforcement official that implicates the victim's Fourth Amendment interest to be free from unreasonable seizures. (*Reed v. Hoy*, 909 F.2d 324, 329 (9th Cir. 1989), overruled on other grounds by *Virginia v. Moore*, 553 U.S. 164, 175 (2008); *Ludwig v. Anderson*, 54 F.3d 465, 471 (8th Cir. 1995) [applying mace constitutes a seizure].)

Here, the officers terminated plaintiffs' freedom of movement through means intentionally applied when they fired and launched impact munitions, explosive grenades, and chemical weapons at them and sprayed them with water cannons and/or hoses.

In *Nelson v. City of Davis*, police responding to an unruly party involving 1,000 university students launched pepperballs into the crowd, and a student was shot in the eye. The officers, like defendants here, argued that their actions could not constitute a seizure because their intent was to disperse the crowd, not to make arrests.

The Supreme Court has repeatedly held that the Fourth Amendment analysis is not a subjective one. *See, e.g., Ashcroft v. al-Kidd*, — U.S. —, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011); *Brendlin*, 551 U.S. at 261, 127 S.Ct. 2400; *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). “The intent that counts under the Fourth Amendment is the intent [that] has been conveyed to the person confronted, and the criterion of willful restriction on freedom of movement is no invitation to look to subjective intent when determining who is seized.” *Brendlin*, 551 U.S. at 260–61, 127 S.Ct. 2400 (alterations in original) (internal quotation marks and citation omitted). Recently, the Court again emphasized that “the Fourth Amendment regulates conduct rather than thoughts.” *al-Kidd*, 131 S.Ct. at 2080. Whether the officers intended to encourage the partygoers to disperse is of no importance when determining whether a seizure occurred. The officers took aim and fired their weapons towards Nelson and his associates. Regardless of their motives, their application of force was a knowing and wilful act that terminated Nelson's freedom of movement. It unquestionably constituted a seizure under the Fourth Amendment.”

(*Nelson v. City of Davis*, 685 F.3d 867, 877–878 (9th Cir. 2012).)

The court also found that although the officers did not intend to shoot the student, “he and his fellow students were the undifferentiated objects of shots intentionally fired by the officers in the direction of that group. Although the officers may have intended that the projectiles explode over the students' heads or against a wall, the officers' conduct resulted in Nelson being hit by a projectile that they intentionally fired towards a group of which he was a member. Their conduct was intentional, it was aimed towards Nelson and his group, and it resulted in the application of physical force to Nelson's person as well as the termination of his movement. Nelson was therefore intentionally seized under the Fourth Amendment.” (*Id.* at p. 877.)

The court found similarly in a case arising from large protests against the FTAA meetings in Miami in 2003. Based on allegations that the defendants opened fire on the demonstrators with

tear gas, pepper-spray, shotgun-based projectiles and other weapons, encircled them and forced them to move west, the court found that the plaintiffs had sufficiently alleged a seizure and denied defendants' motion to dismiss their Fourth Amendment claims. (*Jennings v. City of Miami*, No. 07-23008-CIV, 2009 WL 413110, at \*9 (S.D. Fla. Jan. 27, 2009); accord, *Marbet v. City of Portland*, No. CV 02-1448-HA, 2003 WL 23540258 (D.Or. 2003); *Coles v. City of Oakland*, No. C03-2962 TEH (N.D.Cal. 2005). See also, *Loria v. Town of Irondequoit*, 775 F. Supp. 599, 604 (W.D.N.Y. 1990) [For Fourth Amendment purposes, the officer's motive for drawing and firing the weapon, whether for self defense or to apprehend or stop a suspect, goes to the "reasonableness" of his actions and not to whether there was a "seizure" in the first instance.].)

## **2. Defendants' Use of Force Was Not Objectively Reasonable**

Defendants' brief plays on an atmosphere of high emotion around the ongoing pipeline protests, conflating First Amendment activity, nonviolent civil disobedience, and violent acts that have occurred on various occasions without ever mentioning any specific acts by any of the plaintiffs in this case.

It is clear from the 50 declarations submitted by plaintiffs, the video evidence, and the analysis of defendants' affidavits and the videos by Commissioner Frazier, that only a small number of people were involved in throwing objects or trying to breach the blockade, while the vast majority of people present on the bridge were nonviolent. Indeed, even if one assumes that all those on the front line were intent on assaulting law enforcement, which is contradicted by the declarations and video evidence, it is undisputed that defendants directed the same weapons, including water, chemical agents and munitions, at the bigger crowd that was separated from the front line and were peacefully singing, praying, drumming, trying to warm up, observing or documenting the event, or helping others. Even assuming *arguendo* that they had received orders to disperse -- which would only be true for the relatively small number who were present early in the evening -- at worst, these water protectors were engaged in "the tradition of our nation's deeply rooted and widely accepted history of civil disobedience." (*Cavanagh v. Humboldt Cty.*, No. C 97-4190 CRB, 1999 WL 96017, at \*5 (N.D. Cal. Feb. 22, 1999), *aff'd*, 1 F. App'x 686 (9th Cir. 2001).) Civil disobedience and violence are not the same thing. "Americans accept that civil disobedience has a legitimate if informal place in the political culture of their community. Few Americans now either deplore or regret the civil rights and antiwar movements of the 1960s.

People in the center as well as on the left of politics give the most famous occasions of civil disobedience a good press, at least in retrospect. They concede that these acts did engage the collective moral sense of the community. Civil disobedience is no longer a frightening idea in the United States.” (Ronald Dworkin, *A Matter of Principle*, 105 (1985).) Civil disobedience, alone, does not justify the use of force.

The determination of whether force is reasonable under the Fourth Amendment requires “careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” (*Graham v. Connor*, 490 U.S. 386, 396 (1989).) Here, even leaving aside the lack of actual notice, plaintiffs’ crime was, at worst, trespassing, a Class B misdemeanor. Nor were they resisting or trying to evade arrest. And, as explained by Commissioner Frazier, there was no real threat to the officers, who were behind multiple layers of heavy vehicles, barricades and concertina wire and were wearing body armor, helmets, visors and carrying shields. Even if a given individual presented a threat by throwing something or trying to climb over the concertina wire, the officers could and did, immediately arrest them and bring them under control. Clearly, the use of high levels of force was unnecessary.

Moreover, the issue in this case and the conduct plaintiffs seek to enjoin is not the use of force in self defense against a specific individual who assaults the police, but the indiscriminate mass use of highly dangerous munitions and water against the crowd, when with the exception of a small number of individuals, the crowd was peaceful.

Finally, as Commissioner Frazier noted, the use of the water cannon and other weapons continued for many hours after it was clear that these tactics were not succeeding in causing the crowd to disperse. Indeed, it is clear that defendants’ actions had the opposite effect since as long as the law enforcement violence continued, people remained on the bridge. Once defendants realized their use of force was ineffective, the continued use was blatantly unconstitutional, gratuitous physical punishment. (See *Headwaters Forest Def. v. Cty. of Humboldt*, 276 F.3d 1125, 1130 (9th Cir. 2002), *as amended* (Jan. 30, 2002) [use of pepper spray to induce locked down protesters to unlock was unnecessary and it was “even *less* necessary to *repeatedly* use pepper spray against the protestors when they refused to release from the [locks].”] (emphasis in original).)

**IV. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE INJUNCTION IS NOT GRANTED.**

Defendants' indiscriminate use of highly dangerous weapons has continued since the November 20 incident despite the greatly reduced number of person currently involved in the protest activity, and there have been additional serious injuries. (See Declaration of Marcus Mitchell, who was shot in the eye and in the back of the head on January 19; and see [http://bismarcktribune.com/news/state-and-regional/fourteen-arrested-in-protests-at-backwater-bridge-dapl-drill-site/article\\_7cf69492-75bf-599a-8e96-3b9c705620a0.html?utm\\_medium=social&utm\\_source=facebook&utm\\_campaign=user-share](http://bismarcktribune.com/news/state-and-regional/fourteen-arrested-in-protests-at-backwater-bridge-dapl-drill-site/article_7cf69492-75bf-599a-8e96-3b9c705620a0.html?utm_medium=social&utm_source=facebook&utm_campaign=user-share); <https://www.theguardian.com/us-news/2017/jan/18/dakota-access-pipeline-protesters-police-used-excessive-force> (law enforcement use of munitions on January 16).)

**V. THE BALANCE OF HARM, AND THE PUBLIC INTEREST, WEIGH IN FAVOR OF GRANTING THE INJUNCTION.**

Granting the requested injunction against use of water hoses or cannons in freezing weather and indiscriminate use of munitions for crowd dispersal will not harm the public or law enforcement in any way because it will not prevent defendants from enforcing the law in a constitutional manner or legitimately protecting themselves and others from physical attack. Plaintiffs are simply asking that contemporary law enforcement standards be followed. Police agencies all over the country deal with similar protests without using water hoses or shooting munitions into crowds, which can and have caused serious injuries and even deaths. Adopting a de-escalation approach will benefit defendants, the plaintiffs and the community.

Mass demonstrations... are occasions where evidence-based practices successfully applied can make the difference between a peaceful demonstration and a riot. Citizens have a constitutional right to freedom of expression, including the right to peacefully demonstrate. There are strong examples of proactive and positive communication and engagement strategies that can protect constitutional rights of demonstrators and the safety of citizens and the police.

(U.S. Dept. Of Justice, *Final Report of the President's Task Force on 21<sup>st</sup> Century Policing*, May 2015 <[https://cops.usdoj.gov/pdf/taskforce/TaskForce\\_FinalReport.pdf](https://cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf)>, p. 20.)

Time and time again across the country, when police respond to protests loaded for bear, it provokes protesters and leads to confrontation and violence that could have been avoided. An analysis of demonstrations in 192 U.S. cities concluded that protests tend to turn violent when



officers use unnecessarily aggressive tactics. (San Francisco Chronicle, <<http://www.sfgate.com/bayarea/article/Police-often-provoke-protest-violence-UC-5704918.php>>.) The U.S. Department of Justice analysis of the police response to the August, 2014, demonstrations in Ferguson, Missouri, concluded similarly, finding that an elevated initial response escalated animosity toward the police and undermined the police's peacekeeping role. (U.S. Department Of Justice Office of Community Oriented Policing Services Critical Response Initiative, *After-Action Assessment of the Police Response to the August 2014 Demonstrations in Ferguson, Missouri* (2015) <<http://ric-zai-inc.com/Publications/cops-p317-pub.pdf>>, e.g. pp. 59-60.)

Law enforcement has ample tools at its disposal to manage crowds and deal with unlawful conduct, without sacrificing officer safety and without inflicting life threatening injuries or needless corporal punishment on protesters.

## VI. CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that this Court hold an evidentiary hearing and enter a preliminary injunction.

Dated: January 23, 2017

Respectfully Submitted,

/s/  
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